

## Notable Constitutional Court Cases: Constitutional Law\*

### 1. Constitutional Court, 2013Hun-Da1, Dec. 19, 2014 [Dissolution of Unified Progressive Party Case]

#### 【COMMENTS】

This decision is the first case of the South Korean government filing a petition asking for a dissolution of a political party, and the first case in which the Constitutional Court of Korea decided about a dissolution a political party. Two points were mainly considered in this case: firstly, the meaning of the phrase ‘the objectives of activities of a political party are against the basic democratic order’, on the aspect of legal principle, and secondly, ‘whether the objectives or activities of the Respondent is against the basic democratic order or not’, and ‘if yes, whether it should be dissolved or not’, on the factual aspect.

The Constitutional Court emphasized that the dissolution system aims to protect political party, that the system should be applied very strictly and narrowly, and that the decision should also observe the principle of proportionality even when the objectives or activities are concluded to be against the basic democratic order.

On the factual aspect, how the ‘progressive democracy’ which the Respondent follows should be understood, and whether illegal activities of some members of the Respondent could be understood as activities of the Respondent itself or not, were to be concluded. The Constitutional Court

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\* In this section, several notable Korean Constitutional Court cases are excerpted, with a short comment for each case. For the current issue, Professor Sang-Hyun Jeon prepared the comments, edited the excerpts, and supervised the work of student editors.

concluded that the Respondent has a hidden 'true objective' and that the true objective was against the basic democratic order. Also, the activities of some members were concluded to belong to the Respondent as they were the leading members of the party. The dissenting opinion pointed out that the concepts of 'true aim' and 'leading members' are vague and arbitrary and thus the majority opinion is not convincing.

The Constitutional Court provides that 'the dissolution should be applied very strictly and narrowly', but also mentions 'the distinctiveness of Korean society' to emphasize that 'current social aspects, distinctive historical background, people's attitude and feeling, etc. should also be considered.' It is understood that the Constitutional Court is offering a strict criteria on the aspect of legal principle on one side, but relaxing the criteria on the other side on factual aspect, giving 'the distinctiveness of Korean society' as the reason.

#### 【BACKGROUND OF THE CASE AND THE PROCEDURAL MATTERS】

##### *A. The Request to the Dissolving Decision*

The Respondent, the Unified Progressive Party, was formed on December 13, 2011. Members of New Progressive Party (hereinafter "NPP") who were willing to consolidate with Democratic Labor Party (hereinafter "DLP") left their party and formed a political group that eventually merged with DLP, forming the Respondent.

Article 8 Section 4 of the Constitution provides that, "If the objectives or activities of a political party are against the basic democratic order, the government may bring an action against it in the Constitutional Court, and the political party will be dissolved by the decision of the Constitutional Court." The Petitioner, the Republic of Korea Government (the Minister of Justice being the legal representative), requested adjudication on dissolution of the Respondent and forfeiture of seats of the National Assembly members affiliated to the Respondent on November 5, 2013.

##### *B. Legitimacy of the Request*

If any objective or activity of a political party are contrary to the democratic basic order, the Government may request through a deliberation of the State Council an adjudication on dissolution of the political party to the Constitutional Court (Constitutional Court Act Article

55). The meeting for a deliberation of the State Council took place on November. 5, 2013. Although the prime minister, not the president, presided over the State Council meeting, the meeting is still considered legal since the president was on an overseas tour. Also, the procedure did not include vice-minister class meeting, which is in principle not allowed. However, it is provided that in an urgent case the vice-minister class meeting can be exceptionally skipped. Thus, the request of the government can not be concluded illegal and is legitimate.

### *C. The Procedure*

Article 40 Section 1 of the Constitutional Court Act stipulates that the laws and regulations related to civil litigation shall apply *mutatis mutandis* to the Constitutional Court's adjudication procedures unless they are against the nature of constitutional adjudication. The Respondent filed a constitutional complaint against Constitutional Court Act Article 40 Section 1, which stipulates that civil litigation procedure shall be applied in political party dissolution, on January 7, 2014. The Constitutional Court denied the request on February 27, 2014. (2014Hun-Ma7). In accordance with this decision, civil litigation procedure was applied in this case insofar as not contrary to the nature of the adjudication of political party dissolution.

## 【THE MEANING AND THE REASON OF THE SYSTEM OF POLITICAL PARTY DISSOLUTION】

### *A. The Meaning of the System of Political Party Dissolution*

Every political party is protected by the Constitution. Considering the importance of a political party in a democratic society, a political party shall be dissolved and excluded from the political sphere only by the Constitution and by the decision of the Constitutional Court (99Hun-Ma135, December 23, 1999).

Thus this system of dissolution of a political party is to protect political parties, especially the opposition parties from possible abuse of power, as well as to set a limitation on political parties not to violate the basic democratic order.

### *B. The Reason of Dissolution of a Political Party*

Article 8 Section 4 of the Constitution provides that "If the objectives or activities of a political party are against the basic democratic order, the

government may bring an action against it in the Constitutional Court, and the political party will be dissolved by the decision of the Constitutional Court.” Related to the reason of the dissolution, the interpretation of this clause is important.

(1) “The Objectives or Activities of a Political Party”

The objectives of a political party refer to the political directions or plans of a political party as a whole. The objectives of a political party are shown through its platform, official activities of the representatives, publications of the party, etc., and sometimes a ‘true objective’ may be hidden behind the formal platform.

Activities of a political party are activities of the party institution, the representatives, and the members in whole, which belong to the party. Activities of the party representative, central committee, supreme council, party convention can be understood as the activities of the party. Members of the National Assembly are representatives of the people, not the party, and thus their activities do not directly belong to the party, but when the activities are made in close relation to the party, it may be concluded to be so.

Activities of ordinary individuals or assembly of the members should be understood in relation to the concrete, holistic circumstances and whether the party supported or encouraged the activity or not would be important. Likewise, private, individual activities of a representative or a leading member may be understood as an independent activity depending on the concrete circumstance. Then, either the objectives or the activities being against the basic democratic order is enough reason for the request of dissolution based on the Constitutional clause.

(2) “Basic Democratic order”

Basic democratic order stipulated in Article 8 of the Constitution is premised upon the pluralistic view of the world which trusts in autonomous human reason and assumes that all political ideals have relative verity and rationality. The basic democratic order, therefore, implies a political order that is constituted and operated by the democratic decision making process which respects majorities yet is considerate of minorities, and by the basic principles of liberty and equality, excluding

any violent and arbitrary ruling. Specifically, popular sovereignty, respect for basic human rights, separation of powers and plural party system, etc., are its important constituents under the current Constitution.

Given the importance of the freedom of activities of political party in democratic society and the risk of the system's being misused, Article 8 Section 4 of the Constitution should be interpreted as strictly and narrowly as possible. Thus, this basic democratic order need not be exactly identical with democracy which the current Constitution settles. Instead, if the political party accepts the minimum factors to operate and protect democratic decision making procedure, it would be enough.

The decision of dissolution does not depend on which political ideology a political party follows, but on whether its objectives of activities are against the basic democratic order. Thus the fact that a political party follows a certain ideology does not directly mean that the political party is unconstitutional.

### (3) "Against"

Enforced dissolution of a political party is a serious restriction on the freedom of political party activities, and considering the role political party has in today's democratic society, such decision should be applied as strictly and narrowly as possible.

Thus the violation of the basic democratic order of Article 8 Section 4 occurs when the objectives or activities of a political party incur specific, not theoretical, danger to cause substantial threat to the democratic order in our society.

### (4) The Principle of Proportionality

Enforced dissolution of a political party is a serious restriction on the freedom of political party activities which is guaranteed by the constitution. Therefore in addition to violation of the basic democratic order, the following criteria must also be satisfied in order for the Court to render a decision of party dissolution.

First, there must be no other alternative than dissolution to remove the unconstitutionality inherent in the political party at issue.

Second, the social interests gained by the decision to dissolve the political party must far outweigh the disadvantages incurred by the

restriction of the freedom of political party activities.

#### 【THE DISTINCTIVENESS OF KOREAN SOCIETY】

Republic of Korea has being declared as an enemy by North Korea and thus it is consistently exposed to danger by North Korean attempts to overthrow the ROK government. This case also is related to current situation of North and South Korea in confrontation. Thus current social aspects, distinctive historical background, people's attitude and feeling, etc. should also be considered when deciding the dissolution of a political party.

#### 【THE DISSOLUTION OF THE RESPONDENT】

##### *A. The Objectives and Activities of the Respondent and the Basic Democratic Order*

(1) While Democratic Labor Party, Participation Party and some members of New Progressive Party together formed the Respondent, the National Liberation front was the leading faction in organizing the Respondent and aimed to realize progressive democracy. The leading members controlled the Respondent after the Participation Party faction left the Respondent due to the series of events such as the illegitimate primary in selecting proportional representatives and the violence at the central committee. The leading members had followed *juche* ideology within their diverse activities in the past. Judging from the attitude toward North Korea, the status and history of activities, and ideological disposition, the leading members of the Respondent plainly support North Korea.

The leading members of the Respondent observe South Korea as a society of pariah capitalist or half-capitalist colony under the control of foreign powers, and assert that these social ills have extorted the sovereignty of the nation and exploited the people. They suggest the system of 'progressive democracy' as a new alternative as well as a transitional system for socialism.

Also the leading members of the Respondent propose self reliance of people, democracy, national reconciliation and unification as the task imposed by the platform. For the establishment of socialism through unification of the federal system, which is the final task of the platform, people's democratic revolution must first take place, and they believe that

'self reliance' should be achieved first in accomplishing unification and democracy.

The leading members of the Respondent advocate seizing power through election and the right of resistance as a means to implement progressive democracy, and assert that the existing free democratic system can be overthrown by use of force and taken over by a new progressive democratic regime. All considered, the true intent and purpose of the leading members of the Respondent according to the platform is primarily to achieve progressive democracy through violence and to finally realize socialism through unification.

(2) Lee Seok-ki, a national assemblyman of the Respondent, and some party executives held an assembly to discuss plans with regard to the highly increased tension between South Korea and North Korea on May 10 and 12, 2013. The attendees specifically discussed to blow against key national infrastructures, preparation or extortion of weaponry including firearms was mentioned, and drafted guidelines or manuals for the military operation. Considering the details of these assembly, the status of the attendees among the Respondent, the attitude of the Respondent on this case, etc., these assembly belong to the activities of the Respondent.

Also, the illegitimate primary in selecting proportional representatives, the violence at the central committee, etc., are examples of denying the parliamentary system and rule of law, by violating democratic decision making procedure and voting system.

(3) The leading members of the Respondent aim to achieve progressive democracy through violence and to finally realize socialism through unification. The leading members of the Respondent support North Korea, and the progressive democracy they claim is identical, or at least substantially similar to North Korea's National Liberation and People's Democracy Revolution. Also, the leading members of the Respondent advocate the positions of North Korea in pursuing revolution under the theory of people's democratic revolution and deny the legitimacy of the Republic of Korea. This tendency is clearly shown in the insurrections attempt case of Lee Seok-ki. Considering these circumstances and the fact that these leading members' objectives and activities belong to those of the

Respondent, it can be concluded that the true intent and purpose of the Respondent is primarily to achieve progressive democracy through violence and to finally realize North Korean-style socialism.

(4) The socialist regime of North Korea that is pursued by the Respondent fundamentally contradicts basic democratic order in that it is based on one person dictatorship. The Respondent argues that in order to realize progressive democracy, the incumbent government can be overthrown by violence, which also directly conflicts with the basic democratic order. In addition, the activities of the Respondent including insurrection attempts, illegitimate primary in selecting proportional representatives, the violence at the central committee deny the parliamentary system and rule of law in terms of substance. In terms of their means or nature, they are also contrary to the ideas of democracy since violence is willingly used to serve their purpose.

The Respondent's activities imply that they would likely be repeated in similar circumstances in that the activities were grounded on the Respondent's ulterior motive, considering their details, appearances, nature of the leading members of the Respondent, and attitude of the Respondent regarding the activities of its members. Furthermore, the Respondent admits the possibility of seizure of power through violence, and a number of its activities have exposed specific danger of substantial threat to the basic democratic order. The insurrection related case where the leading members of the Respondent discussed specific ways to threaten the existence of South Korea in sympathy with North Korea, in particular, reveals the true purpose of the Respondent, compounding specific danger against basic democratic order, beyond the limitation of freedom of expression.

In conclusion, the true purpose of the Respondent or its activities based thereon as mentioned above are considered to have caused a concrete risk of substantially harming the basic democratic order in our society, and are therefore in violation of the basic democratic order.

#### *B. The Principle of Proportionality*

Under unique circumstance of confrontation with North Korea which strives to overthrow our government, there is no alternative other than



dissolution considering the sheer danger of the objectives and activities of the Respondent that seeks to pursue North Korean-style socialism, since criminal punishment of its individual members will not be sufficient to eliminate the danger inherent in the entire party, and leading members of the Respondent holding main party positions have control over the decision making process of the party. Also, the social interest in safeguarding the basic democratic order and diversity far outweighs the disadvantage caused by party dissolution, namely the restraint on the Respondent's freedom to engage in party activities.

【FORFEITURE OF THE NATIONAL ASSEMBLY SEATS】

It is not specified in law whether members of the National Assembly shall lose their seats when their party is dissolved by the Constitutional Court. Yet, the essence of political party dissolution lies in protecting citizens by excluding unconstitutional parties from the political sphere. If the members of the dissolved party are allowed to keep their National Assembly seats, the political opinions of the unconstitutional party will continue to have voices in the National Assembly, which practically amounts to continued existence of the dissolved party. Therefore once the Constitutional Court decides to dissolve a party, its affiliated lawmakers should be removed from their National Assembly seats regardless of how they were elected.

【DISSENTING OPINION】

*A. The Objectives and Activities of the Respondent and the Basic Democratic Order*

(1) 'People sovereignty' and 'self reliant economic system' in which the Respondent proposes, do not deny the principle of popular sovereignty, private ownership of property or freedom of economic activities. Also the 'Korean federation' that the Respondent argues is only set as a transitional system and is far from its final image of unified Korea. All considered, it can not be concluded that progressive democracy in the platform denies fundamental human right or agree with North Korean strategy of unification under communism.

'Progressive democracy' was introduced through Democratic Labor Party's platform and is thought to contain socialistic ideal and virtue. This

concept does not necessarily coincide with North Korean strategy against South Korea.

The Petitioner argues that the Respondent or the leading members of the Respondent follow North Korean-system and aims to overthrow South Korean-system. However, it can not be concluded that the Respondent follows North Korean-system from the fact that the NL faction shares ideologies apart from the public and that the NL faction had large proportion among the Respondent. Also, the argument that the leading members of the Respondent are directly related to North Korea is not convincing.

It remains to be concretely proven that the Respondent or its leading members actually support the North Korean system, endorse radical transformation through violent anti-democratic means, or attempt to overthrow the basic democratic order. Therefore I cannot conclude that the objectives of the Respondent violate the basic democratic order.

(2) The insurrection activities led by Lee Seok-ki and others show a concrete risk of substantially harming the basic democratic order in our society, but were made against the basic political line of the Respondent at large. It remains to be proven that the Respondent actively supported these activities.

The illegitimate primary for selecting proportional representatives, violence at the central committee, etc. are admitted to be undemocratic and illegal. However these activities were done by only a few members of the Respondent and not by the whole Respondent. Except for certain actions, the Respondent has fulfilled its typical role as a political party and certain criminal actions have been controlled by both criminal law and political decisions. Thus, it is difficult to reason that the Respondent actively supports these acts or that these people greatly influence the Respondent.

Thus the activities of the Respondent are not in violation of the basic democratic order.

#### *B. The Dissolution and the Principle of Proportionality*

Enforced party dissolution must be used only as a last resort because it can be a serious threat to democracy. However, there already is effective criticism and refutation about the Respondent in the political public sphere,

as shown in election results and criminal punishment of some party members. Also, considering the social stigma for the vast majority of its regular members and today's reality of South and North Korea including the significant gap in national power, the decision to disband the Respondent is in violation of the principle of proportionality.

【SUPPLEMENTARY OPINION】

(omitted)<sup>1)</sup>

## **2. Constitutional Court, 2012Hun-Ma192, Oct. 30, 2014 [National Assembly Election Redistricting Plan Case]**

【COMMENTS】

According to the Court's decision in the case, an electoral district with a population not exceeding the 33 $\frac{1}{3}$ % maximum deviation limit from the average population of electoral districts (equivalent to setting the permissible maximum ratio between the most populous district and the least at 2:1) is not unconstitutional. Two different decisions of the Court already suggested two different permissible limits on population disparity of electoral districts. The Court's decision in 95Hun-Ma224 set the permissible maximum deviation of population in an electoral district from the average population of electoral districts at 60%. Afterwards, the decision in 2000Hun-Ma92 set the limit at 50%. An interesting part of the Court decision in 2000Hun-Ma92 is that while the Court used 50% criterion as a new limit, the Court also suggested 33 $\frac{1}{3}$ % or a more exacting criterion as a limit in the future. In other words, the change in the permissible maximum deviation of population in an electoral district from the average population of electoral districts was foreseeable, in which the change was merely a matter of time. Six justices of the Court in this case decided that it is time to change whereas three justices opposed arguing that the criterion should not be changed except for changes in circumstance.

Considering that the members of the National Assembly represent the

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1) The supplementary opinion only emphasizes the majority opinion's main point and does not differ critically in its reasoning.

Korean people as a whole although they are elected into the office by electors of an independent electoral district in accordance with Constitution, it can be said that idealistic deviation of population between electoral districts would be zero. However, since the Korean Constitution adopts the unicameral system a National Assembly member represents the Korean people as a whole and also represents the electors from a particular locality, which is different from a bicameral system. Under this system, it is questionable whether the deviation of population between electoral districts closer to 0 is consistent with the Constitution, ignoring the locality representation of the National Assembly members. The dissenting opinion of the three justices is based on this question.

#### 【OVERVIEW OF THE CASE】

The Complainants have the right to vote for a National Assembly election, and filed a constitutional complaint against Table 1, “the National Assembly Election Redistricting Plan” (hereinafter the Election Redistricting Plan), pursuant to Article 25(2) of the Act on the Election of Public Officials and the Prevention of Election Malpractices (amended by Act No.11374 on February 29, 2012, hereinafter the Public Election Act) alleging that the present National Assembly Election Redistricting Plan was against the principle of equal election and that the Plan, under which the value of the complainant’s vote is lower than a vote of an elector in other districts, infringed on the complainants’ right to equality and the right to vote, political party members’ freedom of political association, candidates’ fundamental right of officials who are running for National Assembly election.

#### 【SUBJECT MATTER OF THE REVIEW】

The subject matter of review is the constitutionality of “Daejeon Dong-gu” Electoral District, “Gyeonggi-do Suwon-si C”, “Gyeonggi-do Yongin-si B”, “Chungcheongnam-do Cheonan-si A and B”, “Chungcheongbuk-do Cheongju-si Sangdang-gu”, “Seoul Gangnam-gu A”, “Seoul Gangseo-gu A”, and “Incheon Namdong-gu A” Electoral District in Table 1, Election Redistricting Plan, pursuant to Article 25(2) of the Public Election Act. Contents of the Election Redistricting Plan are as shown in Attachment 1.

**【REASONING】***A. Whether the respective Election Redistricting Plan violates the Principle of Equal Election***(1) Permissible Limit on Population Disparity**

Taking into account the following reasons, it is appropriate to change the permissible limit on population disparity from '50% deviation limit, maximum ratio between the most populous district and the least at 3:1' to '33 $\frac{1}{3}$ % deviation limit, maximum ratio between the most populous district and the least at 2:1'.

1) If we apply the 50% deviation limit, it can lead to a situation where a value of one vote becomes equivalent to three times a value of another vote, which is an egregious violation of the principle of equal election. Furthermore, due to the high possibility of lost votes under the unicameral system and the single member district system adopted by Korea, the situation in which the elected candidate receives less votes than the defeated candidate from other district can easily arise. This is inappropriate in light of the principles of representative democracy.

2) The principle that the member of national assembly, instead of having the interest of his district in mind, should conduct affairs with national interest has been established. This principle applies equally to the unicameral system adopted by the Constitution. Thus, even if it is true that the election of members of national assembly should take into account the regional representation, this cannot be prioritized over the principle of equal election which is the starting point of the democratic sovereignty. In addition, the need to advance regional representation over the principle of equal election is not severe as the local autonomy system has been settled. The National Assembly's function of regional representation has been largely substituted by the representation by the local government and regional assembly.

3) According to the Act on Election of Public Officials, it is unlawful to set election districts across city/province borders. Thus, the lowering of population disparity limit will lead to higher disparity between the National Assembly seats per province and the population of province. This will lead to over-represented provinces and under-represented provinces. In fact, the Gyeongsang Province and Jeolla Province which are relatively

more politically active, are over-represented compared to the Seoul-Gyeonggi Metropolitan area or the Chungcheong Province. This over-representation may intensify the tendencies of parties catering to the interest of the region of their political support. In particular, this disparity can be observed in the farming and fishing regions. For instance, a voter registered in “Chungcheongnam-do Buyeo-Chungyang district” enjoys a 2.86 times a vote value compared to a voter registered in “Jeollanam-do Suncheon-Gokseong district”. The disparity among the farming and fishing regions may deter the reasonable change in these regions and does not contribute to the agenda of balanced national development.

4) We have an year and six months left until the next election and the National Assembly has formed, although not a permanent committee, a redistricting committee of experts. This court cannot foresee any practical hardship regarding the redistricting measures in accordance with the higher disparity limit.

5) Considering foreign precedents, the United States requires an absolute election equality regarding the House of Representatives election. If an effort to meet such criteria is not proven, it sees it as a violation of the principle of election equality. Germany employs the 15% deviation limit as a principle and allows 25% deviation limit as an exception under extraordinary circumstances. Japan also has a principle “the ratio between the most populous district and the least should not exceed 2:1 and taking into account administrative, geographical, and transportation circumstances” regarding the Lower House election. Consequently, the Japanese Court has found the 2.3:1 ratio between the most populous district and the least unconstitutional.

## (2) Whether the Election Redistricting Plan is unconstitutional

Part of the Election Redistricting Plan where the population of the district exceeds the  $33\frac{1}{3}\%$  boundary violates complainants’ right to vote and rights to equality.

### *B. Whether the Election Redistricting Plan can be regarded as gerrymandering*

If it is proven that the constituents of a particular district lost a chance to participate in political affairs due to redistricting, or if the candidate they support was intentionally made impossible to get elected to the extent the

discriminatory nature of redistricting against a particular constituency is apparent amounting to gerrymandering, such redistricting is beyond the limits of legislative discretion and is unconstitutional. (96Hun-Ma74, 2000Hun-Ma92) In determining gerrymandering, the formation of a single electoral district out of two geographically separated localities without justifiable social, geographical, historical, economic or administrative reasons, would not be acceptable. (2000Hun-Ma92)

Four cases in point in which a part of an administrative district was separated and added to another district (“Gyeonggi Province Suwon-byung district”, “Gyeonggi Province Yongin-gap district”, “Gyeonggi Province Yongin-eol district”, “Chungcheongnam Province CheonAn-gap district”) are justified for legitimate reason of achieving equality in the value of each vote and the fact that the separated districts are adjacent to the added district. Thus such measure of separating and adding district is not discriminatory. Furthermore, it cannot be concluded as a overreaching of the legislative discretion from the mere fact that National Assembly deviated from the Redistricting Committee version or the Local Assembly District Table.

Thus, legislative measures regarding the four districts did not go beyond the scope of legislative discretion.

### *C. The Unconformable to Constitution declared on the entire Redistricting Plan*

Since each districts are organically inter-related and a change in one district serially affects all other districts, if a part of the Redistricting Plan is unconstitutional, the entire Plan should be deemed of flawed with unconstitutionality. (95Hun-Ma224, 2000Hun-Ma92)

The Court could render a decision of simple unconstitutionality. However, the following facts have to be considered in doing so: that General Elections for the National Assembly have already been held based on the current Redistricting Plan; that there may arise a vacuum in law if a special election or re-election for a particular district is to be held before the revision of the Plan, because the speedy revision of the Plan would be impossible due to its political nature; and that in order to maintain homogeneity in the composition of the National Assembly and to prevent confusion caused by changes in the electoral district, it is better that a special election or re-election is held under the present Redistricting Plan.

Therefore, the Court finds the Redistricting Plan unconformable to the Constitution, but orders it to remain effective temporarily until December 31, 2015, by which the legislature must revise the Plan.

【DISSENTING OPINION】

(1) Along with Article 41(1) of the Constitution which declares the “principle of equal election,” Article 41(3) of the Constitution delegates the decision making power concerning details of the election system and constituency rezoning to legislative discretion by stating that “matters pertaining to National Assembly elections shall be determined by Statute.” In this respect, Article 25(1) of the Public Election Act embodies such understanding as it states that “the local constituency for National Assembly shall be demarcated in the area under jurisdiction of the City/Province, in consideration of the population, administrative districts, geographical features, traffic, and other conditions.” Therefore, the legislature can take into consideration not only the population disparity, but also administrative districts, geography of particular area, traffic, living sphere, sense of historical or traditional solidarity, or any other policy or technical factors when realigning the electoral districts.

(2) In case of Korea, each district has different demand to the national policy, especially due to the population density and the developmental gap between urban and rural communities. Also, considering that National Assembly elections are recognized as a system to select delegates who represent the demand of different area, it cannot be denied that a National Assembly member also represents the electors from a particular locality. During the process of rapid industrialization and urbanization, population concentration in metropolitan areas leads to population disparity between urban and rural electoral districts. Besides, focusing on the urban development policy has resulted in inequality of development in all spheres of urban and rural areas, and differences in the two areas are widening. In this situation, through the 2000Hun-Ma92 case, the Constitutional Court declared that adopting the existing 60% criterion (equivalent to population ratio of 4:1) as an permissible limit on population disparity in electoral districts would be unconstitutional, and suggests to set the maximum deviation of population in an electoral district from the



average population of electoral districts at  $\pm 50\%$  (in this case, the maximum ratio between the most populous district and the least populous district would be 3:1). However, it is questionable whether all the problems that led to choose to set the maximum deviation at  $\pm 50\%$  in 2001 have been solved, and circumstances become better enough to demand the  $33\frac{1}{3}\%$  criterion. A significant inequality of economic power and population gap between urban and rural areas, which makes it reasonable for a National Assembly member to represent the electors from a particular locality, and the problems regarding division of administrative districts and adding it to another or increasing the total number of seats in the National Assembly are still relevant problems to consider currently, likewise in 2001.

The majority opinion insists that regional representation of the national assembly member cannot be prioritized over principle of equal election, since the representation of the local government and regional assembly can manage actively with its problem as the local autonomy system has settled. However, considering the difference between discretion of national assembly and regional assembly along with the financial independence of a local government, regional representation of national assembly member is still as important as equality in the voting rights.

(3) It is true that most of electoral districts will be realigned, if the Court adopted the  $33\frac{1}{3}\%$  criterion and abolished the existing 50% criterion. Under the circumstance where population is concentrated in metropolitan areas, it would not be difficult to predict only members representing urban constituencies would increase in total relative to the members representing rural and suburban districts where regional representation is desperately needed. In this regard, representing the interest of rural and suburban citizens will be insufficient in the national assembly, due to the majority rule.

(4) Since Korea adopts the unicameral system, a National Assembly member, while representing the Korean people as a whole, also represents the electors from a particular locality, the Court cannot decide the violation of the constitution based on the criteria of population deviation in an electoral district of other countries which adopt bicameral system. Countries with a unicameral system need to take account of regional

representation when electing members of the national assembly, and there is no choice but to be lenient in suggesting the permissible limit on population disparity.

(5) In conclusion, it appears the current situation is not very different from 2001 when the court set the permissible maximum deviation of population in an electoral district from the average population of electoral districts at  $\pm 50\%$  and reviewed constitutionality of the law by this criterion, in the case of 2000Hun-ma92. In this regard, maintaining 50% criterion is still reasonable, while adopting a new  $33\frac{1}{3}\%$  criterion would be too strict and inappropriate.

All of the electoral districts that are found to be unconstitutional on the basis of  $33\frac{1}{3}\%$  criterion by the majority opinion, do not exceed the 50% deviation limit, and including these electoral districts, there is no other district exceeding this limit; therefore, the entire Election Redistricting Plan of this case are not contrary to the constitution.

### **3. Constitutional Court, 2013Hun-Ma359, Aug. 28, 2014 [Foreigner's Basic Right Subjectivity Case (Medical Service Act Article 27)]**

#### **[COMMENTS]**

A constitutional appeal can be raised by "a person whose basic rights has been infringed" and therefore a constitutional appeal that has been raised by a person without the basic rights will be dismissed without entering the merits phase. The issue of whether a foreigner can legally claim basic rights arises because the articles of the constitution on basic rights uses the phrase "citizens". Until now, the constitutional court has distinguished basic rights into "human rights" and "citizen's rights" depending on the characteristic of the right, and has adjudged that foreigners have the subjectivity on "human rights" but not with "citizen's rights". According to this jurisprudence of the constitutional court, depending on the characteristic of basic rights -whether human rights or citizen's rights - a foreigner will be able to claim a constitutional appeal.

In this case, a foreigner raised a constitutional appeal based on an

infringement of “the freedom of occupation” and the constitutional court dismissed the case on the grounds that the state can restrict the freedom of occupation by law and the freedom of occupation does not have the characteristic of universal human values. The complainant also raised an infringement of “right to equality.” However regarding the right to equality, the subjectivity is determined by the characteristic of the basic right that is the substance of the unequal treatment. The complainant is raising the unequal treatment in the freedom of occupation and therefore it was adjudged that a foreigner does not have subjectivity on the right to equality based on the freedom of occupation. Furthermore, regarding the determination of basic right subjectivity, there will be no differentiation between a foreigner who used to be a Korean national and other general foreigners.

In a previous decision the constitutional court had adjudged that even foreigners have the subjectivity regarding the freedom of occupation, but this decision restricted that previous decision’s meaning to ‘merely an exception and a limited recognition in cases where there is an existing labor relationship.’

The constitutional court, through various decisions has defined occupation as ‘a continuous activity of income for the fulfillment of basic needs of everyday life’ and has stated that freedom of occupation ‘a method of fulfilling the needs of everyday life and the foundation for promoting and developing personality.’ In light of these judgments it is questionable whether the freedom of occupation is in fact not a ‘human right.’ In this decision, two Justices had dissenting opinions, stating that “in principle, a freedom right is not a right restricted to Korean nationals but is a basic right that is afforded to every person”.

#### 【CASE SUMMARY】

Complainant 1 was a Korean national and is currently a foreign national countryman with a United States nationality, formerly running an oriental medical clinic in the United States and currently an acupuncturist in Korea with a foreign national countryman (F-4) visa. Complainant raised a constitutional appeal claiming that the Medical Service Act clauses<sup>2)</sup> that

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2) Medical Service Act [2007. 4. 11, Amended by Act No.8366]

prohibit the medical acts of non-medical personnel infringe the complainant's freedom of occupation and violate the principle of equality.

【REVIEW ON WHETHER COMPLAINANTS ARE BEARERS OF FUNDAMENTAL RIGHT】

(1) The constitutional court stated that a 'citizen' or a 'foreigner' who has a status similar to that of our citizen can be a bearer of fundamental right who can request a constitutional complaint under Article 68 Section 1 of the Constitutional Court Act, and ruled that foreigners are entitled to fundamental rights considered as 'human rights' such as human dignity and worth and the right to pursue happiness but not rights just reserved for citizens, thus recognizing foreigners as bearers of fundamental rights in principle (See 2007Hun-Ma1083, September 29, 2011; 2011Hun-Ma474, April 24, 2014). As such, foreigners are not unlimitedly entitled to all fundamental rights but limitedly entitled to some fundamental rights pertaining to 'human rights'. Therefore, we hereby must clarify individually whether the fundamental rights limited by the provision recognize foreigners as bearers of fundamental rights in terms of the nature of the rights concerned (See 2007Hun-Ma1083, September 29, 2011).

Freedom of occupation restricted by the provision is a freedom to which

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Article 27 (Prohibition of Unlicensed Medical Practice, etc.) (1) Any non-medical person shall not perform medical practice, and even a medical person shall not perform any medical practice other than those licensed: Provided, That any person falling under any of the following subparagraphs may perform medical practice within the extent set by the Ordinance of the Ministry of Health and Welfare:

1. A person who holds a foreign medical license and stays in this country for a certain period of time;
2. A person who performs medical practice at a medical college, dental college, college of oriental medicine, general hospital, or foreign medical aid institution for voluntary medical service or a research or exhibition project; and
3. A student of a school majoring in medical science, dentistry, oriental medical science or science of nursing.

Medical Service Act(2009. 1. 30, Amended by Act No.9386)

Article 87 (Penal Provisions)(1) A person, who falls under any of the following subparagraphs, shall be sentenced to imprisonment for a term of not more than five years or a fine not exceeding 20 million won:

1. A person who leases his/her license certificate to any other person; and
2. A person who violates any provisions of Articles 12 (2), 18 (3), 23 (3), 27 (1), and 33 (2) (including a case to which said paragraph shall apply mutatis mutandis pursuant to Article 82 (3)).

the citizens are exclusively entitled as it can be restricted by national law based on the national qualification restriction policy and society's economic situation, and is not of universal character. As such, the freedom of occupation guaranteed by the Constitution is a fundamental right reserved only for citizens, not for foreigners. As foreigners with employment permits pursuant to the national policy can conduct economic activities within the limit of government permits, the freedom of occupation enjoyed by foreigners in the country is not the fundamental right conferred by the constitution, but right conferred by the permits according to national law.

In an earlier decision, the Court stated that when foreigners formed labor relationship by maintaining a regular occupation, the occupation becomes the source to meet one's basic needs and to develop one's personality, and therefore foreigners have freedom to choose and decide whether to maintain the labor relationship without state's interference in the area of occupation, and bear the fundamental right to the freedom of occupation in that limited sense (See 2007Hun-Ma1083, September 29, 2011). However, this is exceptional in that it only applies when a labor relationship is already formed. The right to choose occupation prior to the formation of the labor relationship is a legal right conferred limitedly to foreigners according to national policy, not fundamental right guaranteed by the Constitution. Accordingly, complainant, who is a foreigner, does not bear the fundamental right.

(2) Complainant argues that discrimination of non-health care provider who studied acupuncture against health care provider is infringement on the right of equality. However, as this means that it is unjust to forbid a non-health care provider to do what is allowed to a health care provider, the complainant cannot be recognized as the bearers of the right of equality since he is denied the fundamental right to challenge the qualification system.

(3) Complainant is a foreign national who was a Korean national but obtained the nationality of the United States, and to whom the Act on the Immigration and Legal Status of Overseas Koreans is applied, but as privileges conferred to a Korean with foreign nationality are beneficial rights formed by national law to fulfil the purpose of the Act on the

Immigration and Legal Status of Overseas Koreans (See 99Hun-Ma494, November 29, 2001; 2008Hun-Ba48, December 29, 2009; 2011Hun-Ma474, April 24, 2014), the extension of entitlement to fundamental rights only on the grounds of being a Korean with foreign nationality is not allowed, and complainant is treated no differently from foreigners only because he is a Korean with foreign nationality.

(4) Accordingly, the complainant shall not be recognized as the bearer of the fundamental right to the related provision.

【DISSENTING OPINION】

Article 10 of the Constitution imposes the duty on the state to confirm and guarantee the fundamental human rights of individuals. Every human being has the fundamental human right and has the right to enjoy it, even though he or she does not have the citizenship of the Republic of Korea. And the right to freedom is the fundamental human right based on the human dignity. Therefore, in principle, the right to freedom should be regarded as a fundamental right for every human being, not as a right reserved exclusively for citizens of the Republic of Korea, unless the right is apparently regarded as one reserved exclusively for citizens based on the interpretation of the Constitution.

The majority opinion states that the freedom of occupation is ‘the right of citizens’, not ‘the right of all human beings’ so it does not extend to foreign nationals. However as the freedom of occupation is closely related to the right to pursue happiness as well as human dignity and value, it should not be simply regarded as a right reserved exclusively for citizens (See majority opinions of 2007Hun-Ma1083 and 2009Hun-Ma351). Because foreigners are not allowed to have the freedom of entry to the state, the freedom of occupation in the state is essentially limited. However, the freedom of occupation should not be simply regarded as a legal right which is admitted legislatively by the state for this reason.

The majority opinion states that the acknowledgement of foreigner’s entitlement to basic right of the freedom of occupation in the precedent of 2007Hun-Ma1083 can be exceptionally and limitedly admitted only in the case in which a foreigner who has already established a labor relationship in the state. Following this opinion, it can be said that the foreigner

originally does not have the freedom of occupation and that the fundamental right which is not admitted by the Constitution can exceptionally acknowledged only in the case of employment by an act. However it is difficult to agree with the logic that the fundamental right of the Constitution is acknowledged by an act.

Adopted in 1948 by United Nations General Assembly, and reflecting the purpose of Charter of the United Nations that respects for fundamental rights of all human beings, the Universal Declaration of Human Rights (UDHR) states that *everyone has the right to work, to free choice of employment* (Article 23). Also, founded on UDHR, and carrying legal binding force, International Covenant on Civil and Political Rights (ICCPR; Covenant B) states that *no one shall be required to perform forced or compulsory labour* (Article 8), and International Covenant on Economic, Social and Cultural Rights (ICESCR; Covenant A) recognizes *the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts* and provides that the state should take *the steps to achieve the full realization of this right* (Article 6).

As UDHR and International Covenants confirms, everyone has a basic right to choose the occupation he or she wants freely. Of course, this right may be limited in the certain situations for national security, maintenance of order, and welfare of the public. Especially, the freedom of occupation may be totally limited by the purpose of entry of the foreigner who does not have the freedom of entry to the state. However, a foreigner who is allowed to work in the state recovers his or her right to work and the freedom of occupation in the allowed boundary.

Not acknowledging the freedom of occupation as the fundamental right for the foreigner and just acknowledging it only in the case of dispensation of an act, the majority opinion is inconsistent with the ideas of UDHR and International Covenants which confirms that the right to work is the basic right for the human dignity. The preceding decision of the Court, which states that the right to work and the freedom of occupation are 'the right of all human beings' and are closely related to the right to pursue happiness as well as human dignity and value, is still valid, and reasons to break the precedent cannot be found.

Moreover, the complainant of this case is an overseas Korean who has entered the state with legal qualifications to stay and engage in economic

activity. Therefore, it should not be said that the complainant does not have the freedom of occupation for the reason that he does not have the citizenship of the Republic of Korea. Rather, this constitutional complaint should be judged on the merits to decide whether provisions at issue violate the freedom of occupation of the complainant or not.